No. _____

IN THE

Supreme Court of the United States

JEFFREY GLENN HUTCHINSON,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITIONER'S APPENDIX

THIS IS A CAPITAL CASE

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-10508-P

JEFFREY GLENN HUTCHINSON,

Petitioner - Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent - Appellee.

Appeal from the United States District Court
for the Northern District of Florida

Before: JORDAN, BRANCH, and LUCK, Circuit Judges.

BY THE COURT:

We DENY Jeffrey Glenn Hutchinson's motion for reconsideration of the March 24, 2021 order denying his motion for certificate of appealability and write briefly to respond to the dissenting opinion. The dissenting opinion would grant a certificate to appeal the district court's denial of Hutchison's rule 60(b)(6) motion based on McQuiggin v. Perkins, 569 U.S. 383 (2013) (and other circumstances). But, for two reasons, the district court's denial of Hutchinson's McQuiggin-based rule 60(b)(6) motion is not debatable and does not deserve further encouragement.

First, "the U.S. Supreme Court has already told us that a change in decisional law is insufficient to create the 'extraordinary circumstances' necessary to invoke [r]ule 60(b)(6)." Arthur v. Thomas, 739 F.3d 611, 631 (11th Cir. 2014) (citing Gonzalez v. Crosby, 545 U.S. 524, 535–38 (2005)). While, as the dissenting opinion points out, the Third Circuit disagrees, Satterfield v. Dist. Att'y Phila., 872 F.3d 152, 160–63 (3d Cir. 2017), that disagreement "does not present a debatable question," Lambrix v. Sec'y, Fla. Dep't of Corr., 851 F.3d 1158, 1171 (11th Cir. 2017). "[W]e are bound by our Circuit precedent, not by Third Circuit precedent. Arthur is controlling on us and ends any debate among reasonable jurists about the correctness of the district court's decision under binding precedent." Hamilton v. Sec'y, Fla. Dep't of Corr., 793 F.3d 1261, 1266 (11th Cir. 2015). "And no COA should issue where the claim is foreclosed by binding circuit precedent 'because reasonable jurists will follow controlling law.'" Id. (quoting Gordon v. Sec'y, Dep't of Corr., 479 F.3d 1299, 1300 (11th Cir. 2007)).

Second, even if McQuiggin was sufficient to create the extraordinary circumstances necessary to invoke rule 60(b)(6), its narrow equitable gateway through the statute of limitations "open[s] only when a petition presents evidence of innocence so strong that a court cannot have confidence in the outcome of the trial . . . ." McQuiggin, 569 U.S. at 401 (quotation omitted). Given the overwhelming

evidence that Hutchinson murdered his girlfriend and her children, the confidence in the outcome of his trial is solid and not debatable:

> Hutchinson was charged and convicted of four counts of first-degree murder with a firearm for the murders of his live-in girlfriend, Renee Flaherty, and her three children: four-year-old Logan, seven-year-old Amanda, and nine-year-old Geoffrey. Hutchinson was sentenced to death for the murder of each child.
>
> The relevant facts concerning the murders are as follows. On the evening of the murders, Hutchinson and Renee argued. Hutchinson packed some of his clothes and guns into his truck, left, and went to a bar. Renee then called her friend, Francis Pruitt (Pruitt), in Washington and told her that she thought Hutchinson had left for good. The bartender testified that Hutchinson arrived around 8 p.m. Hutchinson told the bartender, "Renee is pissed off at me," drank one and a half glasses of beer and then left the bar muttering to himself. Other witnesses testified that Hutchinson drove recklessly after he left the bar.
>
> Approximately forty minutes after Hutchinson left the bar, there was a 911 call from Hutchinson's home. The caller stated, "I just shot my family." Two of Hutchinson's close friends identified the caller's voice as Hutchinson's. Hutchinson said to the 911 operator, "There were some guys here." He told the operator that he did not know how many people were there, how many had been hurt, or how they had been injured. Deputies arrived at Hutchinson's home within ten minutes of the 911 call and found Hutchinson on the ground in the garage with the cordless phone nearby. The phone call was still connected to the 911 operator. Deputies found Renee's body on the bed in the master bedroom, Amanda's body on the floor near the bed in the master bedroom, and Logan's body at the foot of the bed in the master bedroom. Each had been shot once in the head with a shotgun. Deputies found Geoffrey's body on the floor in the living room between the couch and the coffee table. He had been shot once in the chest and once in the head. The murder weapon, a Mossberg 12-gauge pistol-grip shotgun that belonged to Hutchinson, was found on the kitchen counter. Hutchinson had gunshot residue on his hands. He also had Geoffrey's body tissue on his leg.

> Hutchinson's defense at trial was that two men came into the house, he struggled with them, and they shot Renee and the children and fled. Hutchinson was examined by an EMT at the scene and a jail nurse. He had no injuries. Hutchinson also presented the defense of intoxication, and he argued that this was a crime of passion, not first-degree murder. The jury found Hutchinson guilty of four counts of first-degree murder.

Hutchinson v. State, 17 So. 3d 696, 698 (Fla. 2009).

Hutchison's rule 60(b)(6) motion offered (allegedly) new evidence that his two friends robbed a bank with masks and a shotgun. But evidence that his friends robbed a bank with masks and a shotgun is not strong evidence that Hutchinson is innocent. As Chief Judge Mark Walker explained in his order denying Hutchinson's rule 60(b)(6) motion and a certificate of appealability, "[e]ven if [the friends] had not identified Mr. Hutchinson's voice on the 911 call, and even if the two men robbed a bank wearing masks and carrying shotguns, the jury had sufficient evidence before it to conclude that [Hutchinson] made the call and that he shot his girlfriend and her children with his own shotgun." (DE 82 at 18); see also Hutchinson, 17 So. 3d at 703 ("We find that this actual innocence claim is without merit."). Hutchinson's shotgun was the murder weapon. He had gunshot residue on his hands. He had the remains of little Geoffrey on his leg. His story that he struggled with the real shooter was contradicted by the physical evidence. He was still connected to the 911 call minutes after confessing that he murdered his family. And he argued with his girlfriend the day he murdered her and her kids. Because Hutchinson has

not made a debatable showing of actual innocence under McQuiggin, he is not entitled to a certificate of appealability.

JORDAN, Circuit Judge, dissenting.

The COA standard, *see* 28 U.S.C. § 2253(c)(2), requires us to decide only whether the district court's ruling on a given claim is debatable. We cannot base our COA decision on a full determination of the merits, and the fact "that a prisoner has failed to make the ultimate showing that his claim is meritorious does not logically mean that he failed to make a preliminary showing that his claim [is] debatable." *Buck v. Davis*, 137 S.Ct. 759, 774 (2017).

Applying that standard, I would grant Mr. Hutchinson a COA to appeal the district court's denial of his Rule 60(b) motion based on *McQuiggin v. Perkins*, 569 U.S. 383 (2013), and other asserted circumstances. Given the Third Circuit's Rule 60(b) decision in *Satterfield v. District Atty. of Philadelphia*, 872 F.3d 152, 160-64 (3d Cir. 2017), the district court's ruling is debatable. Alternatively, Mr. Hutchinson's Rule 60(b) claim "deserve[s] encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-10508-P

JEFFREY GLENN HUTCHINSON,

Petitioner - Appellant,

versus

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent - Appellee.

Appeal from the United States District Court
for the Northern District of Florida

ORDER:

Appellant's motion for a certificate of appealability is DENIED for the same reasons the district court denied his amended Rule 60(b) motion and motion for a COA in its thorough and detailed twenty-six page order.

/s/ Robert J. Luck
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION

JEFFREY GLENN HUTCHINSON,

Petitioner,

v.

Case No. 3:13cv128-MW
CAPITAL CASE

MARK S. INCH, Secretary, Florida Department of Corrections, et al.,

Respondent.

_____/

ORDER DENYING AMENDED RULE 60(b) MOTION

Before this Court is Petitioner Jeffrey Hutchinson's counseled supplement to his pro se motion for relief from judgment pursuant to Federal Rule of Civil Procedure 60(b). ECF No. 78. In Mr. Hutchinson's pro se motion, ECF No. 17, he alleged fraud on the court, actual innocence, and claims of ineffective assistance of counsel under *Martinez v. Ryan*, 566 U.S. 1 (2012). This counseled supplement to that motion is treated as an amended Rule 60(b) motion.[1]

[1] Respondent disputes that the motion is a supplement to Mr. Hutchinson's pro se motion and contends it is an amended motion. ECF No. 79 at 4 n.2. Mr. Hutchinson's counsel replies that it makes little practical difference whether the Court treats the counseled supplemental motion as supplemental to the pro se Rule 60(b) motion filed by Mr. Hutchinson or as an amended motion because this counseled filing is based on and incorporates by reference the substance of Mr. Hutchinson's pro se motion and "makes the strongest arguments in support of granting relief." ECF No. 81 at 2.

In the amended motion, Mr. Hutchinson alleges that relief is available under Rule 60(b)(6) to reopen his 2009 petition for writ of habeas corpus filed under 28 U.S.C. § 2254, which was dismissed as untimely. He contends extraordinary circumstances exist, alleging risk of injustice to the parties and unfairness in the prior § 2254 proceedings. He also cites major changes in decisional law—possible relief under *Martinez*, possible invalidation of his death sentence under *Hurst v. Florida*, 577 U.S. 92 (2016), and actual innocence providing a gateway to review under *McQuiggin v. Perkins*, 569 U.S. 383 (2013). ECF No. 78 at 4-5. The motion further contends that the timing of the Rule 60(b) motion was reasonable and, at a minimum, a certificate of appealability should be granted. *Id.* at 65-67.

Based on these asserted grounds, he contends that his first § 2254 petition filed in 2009, which this Court previously dismissed as untimely, should be reopened.[2] For the reasons that follow, Mr. Hutchinson's amended Rule 60(b) motion is denied.

Background

Mr. Hutchinson was convicted after jury trial in 2001 of murdering his girlfriend, Renee Flaherty, and her three children, Geoffrey, Amanda, and Logan. He was sentenced to life in prison for the murder of Renee and to death for each of the murders of the children. The Florida Supreme Court affirmed his convictions

[2] *See Hutchinson v. Florida*, No. 5:09cv261/RS, ECF No. 39 (Sept. 28, 2010).

and sentences in *Hutchinson v. State*, 882 So. 2d 943 (Fla. 2004). He filed a motion for postconviction relief, which was denied, and he appealed, alleging (1) ineffective assistance of trial counsel in the guilt phase for failure to present evidence that the voice on a 911 call stating that the caller "just shot my family" was not Hutchinson's; (2) ineffective assistance of counsel for failure to introduce evidence of a nylon stocking found in the yard of the crime scene when his theory of defense was that two masked men actually shot and killed the family; and (3) postconviction court error in denying his actual innocence and conflict of interest claims. The Florida Supreme Court affirmed denial of these claims. *Hutchinson v. State*, 17 So. 3d 696 (Fla. 2009). The postconviction motion was filed in 2005 after the one-year limitations period for filing a § 2254 petition for writ of habeas corpus expired and therefore did not toll the running of the limitations period.

Almost four years later, in 2009, Mr. Hutchinson filed his first federal habeas petition, pro se, in *Hutchinson v. State of Florida*, No. 5:09cv261-RS. Counsel was appointed and filed an amended § 2254 petition, which was dismissed as time barred.[3] The one-year statute of limitations set forth in the Antiterrorism and Effective Death Penalty Act (AEDPA) expired in 2005 before Mr. Hutchinson

[3] The claims raised in case number 5:09cv261-RS alleged: (1) ineffective assistance of trial counsel regarding the 911 tape and the nylon stocking; (2) prosecutor's comments in closing argument; (3) testimony of law enforcement about speaking to the Defendant during the portion of the interview that had been suppressed; (4) inappropriate extrajudicial comments to three jurors during a lunch break; and (5) that the aggravating circumstance of age of the child victims did not narrow the class of murders. ECF No. 19.

filed his pro se postconviction motion in State court, and this Court found no basis to apply equitable tolling. ECF No. 39. The Eleventh Circuit Court of Appeals affirmed, concluding that the limitations period was not equitably tolled by counsel's miscalculation in the timing of filing the state postconviction motion. *Hutchinson v. Florida*, 677 F.3d 1097 (11th Cir. 2012). The Eleventh Circuit also found that Mr. Hutchinson had not acted with due diligence in filing his § 2254 petition even though he knew shortly after his postconviction motion was filed in 2005 that the motion would not toll the running of the federal limitations period. *Id.* at 1102.

On March 21, 2013, Mr. Hutchinson, pro se, filed another § 2254 petition for writ of habeas corpus in this Court challenging the legality of the same state court judgment that was the subject of the first § 2254 petition he filed in 2009. *See* 3:13cv128-MW, ECF No. 1. On April 24, 2013, this Court granted Respondent's motion to dismiss the petition as a successive petition not authorized by the Eleventh Circuit Court of Appeals, as required by 28 U.S.C. § 2244(b)(3)(A). ECF No. 7. Mr. Hutchinson's pro se motion to reconsider and to appoint counsel filed on May 10, 2013, ECF No. 8, construed as a motion to alter or amend under Rule 59(e), was denied without prejudice. ECF No. 13.

Mr. Hutchinson then filed a pro se motion for relief from judgment pursuant to Rule 60(b) seeking to reopen the first habeas petition and requested appointment

of counsel. ECF No. 17. Respondent agreed that counsel should be appointed and, on December 11, 2014, the Court appointed the Capital Habeas Unit of the Federal Public Defender to investigate and determine if any legally sufficient grounds could be presented to require the first habeas petition to be reopened under Rule 60(b). ECF Nos. 18, 23. Although the pro se motion for relief under Rule 60(b) was denied by order on December 18, 2014, the denial was without prejudice to appointed counsel filing another Rule 60(b) motion or other pleading alleging any legal bases for relief. ECF No. 24.

On motion of appointed counsel, ECF No. 25, the order denying the Rule 60(b) motion was vacated on January 14, 2015, and Mr. Hutchinson's Rule 60(b) motion was reinstated and held in abeyance pending evaluation by counsel. ECF No. 26. In that order, the case was stayed and Mr. Hutchinson's counsel was directed to file status reports setting forth the status of the evaluation and the intent to amend, supplement, or withdraw the pending Rule 60(b) motion. Mr. Hutchinson's Capital Habeas Unit counsel was also granted leave to exhaust a claim for state court relief under *Hurst v. Florida*. ECF No. 69. *Hurst* relief was denied in state court on March 15, 2018. *Hutchinson v. State*, 243 So. 3d 880 (Fla.), *cert. denied*, *Hutchinson v. Florida*, 139 S. Ct. 261 (2018). After conclusion of discovery for purposes of evaluation and amendment of the Rule 60(b) motion, the stay was lifted on February 25, 2020. ECF No. 77.

On May 26, 2020, Mr. Hutchinson's appointed counsel filed the amended Rule 60(b) motion. ECF No. 78. The motion seeks relief from the dismissal of his 2009 petition for writ of habeas corpus. Respondent filed a response in opposition, ECF No. 79, and Mr. Hutchinson filed a reply with leave of court. ECF Nos. 80, 81.

Rule 60(b)

Federal Rule of Civil Procedure 60(b) allows a party to seek relief or reopen his civil case under these circumstances: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence that with due diligence could not have been discovered in time for a new trial; (3) fraud, misrepresentation, or misconduct by an opposing party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged; and (6) "any other reason that justifies relief." Fed. R. Civ. P. 60(b). "A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment." Fed. R. Civ. P. 60(c)(1). Thus, a motion filed under the catchall provision of Rule 60(b)(6) must be filed within a "reasonable time . . . after the entry of the judgment or order or the date of the proceeding." Fed. R. Civ. P. 60(c)(1).

Rule 60(b)(6) requires the movant to "show 'extraordinary circumstances' justifying the reopening of a final judgment." *Gonzalez v. Crosby*, 545 U.S. 524,

535 (2005) (quoting *Ackermann v. United States*, 340 U.S. 193, 199 (1950)). Extraordinary circumstances that warrant the reopening of a judgment "will rarely occur in the habeas context." *Id.* Even then, whether to grant the requested relief "is a matter for the district court's sound discretion." *Lugo v. Sec'y, Fla. Dep't of Corr.*, 750 F.3d 1198, 1210 (11th Cir. 2014).

The Supreme Court has observed that "not every interpretation of the federal statutes setting forth the requirements for habeas provides cause for reopening cases long since final," but "[a] change in the interpretation of a *substantive* statute may have consequences for cases that have already reached final judgment, particularly in the criminal context." *Gonzalez*, 545 U.S. at 536, and n.9 (emphasis in original). However, the Supreme Court held in *Gonzalez* that the change in the interpretation of the AEDPA statute of limitations announced in *Artuz v. Bennett*, 531 U.S. 4 (2000), as to the meaning of when a state application for postconviction relief is "properly filed," did not constitute "extraordinary circumstances" as required in a motion to vacate. *Gonzalez*, 545 U.S. at 536.

The Eleventh Circuit also held that the change in decisional law brought about by the rule in *Martinez v. Ryan* is not an "extraordinary circumstance" sufficient to invoke Rule 60(b)(6). *Zack v. Sec'y, Fla. Dep't of Corr.*, 721 F. App'x 918, 924 (11th Cir.) (unpublished) (citing *Arthur v. Thomas*, 739 F.3d 611, 631 (11th Cir. 2014), *cert. denied sub nom. Zack v. Jones*, 139 S. Ct. 322 (2018)). And,

the Eleventh Circuit held in *Howell v. Sec'y, Fla. Dep't of Corr.*, 730 F.3d 1257, 1261 (11th Cir. 2013), that the change in law resulting from *Holland v. Florida*, 560 U.S. 631 (2010), is not an extraordinary circumstance justifying reopening a habeas case that was dismissed for untimely filing. *See Holland*, 560 U.S. at 649, 651 (describing as "too rigid" a *per se* rule that "even attorney conduct that is 'grossly negligent' can never warrant tolling absent 'bad faith, dishonesty, divided loyalty, mental impairment or so forth on the lawyer's part' ").

A Rule 60(b) motion cannot be used to circumvent the prohibition on filing unauthorized successive post-conviction challenges. *See Gonzalez*, 545 U.S. at 530-32 (addressing a 28 U.S.C. § 2254 petition). The Supreme Court has held that Rule 60(b) motions are to be considered impermissible successive habeas petitions if the prisoner either (1) raises a new ground for substantive relief or (2) attacks the habeas court's previous resolution of a claim on the merits. *Gonzalez*, 545 U.S. at 531-32. A Rule 60(b) motion is appropriate in a habeas proceeding only when the petitioner does not assert, or reassert, claims of error in the state-court conviction. *Franqui v. Florida*, 638 F.3d 1368, 1371-72 (11th Cir. 2011). Rule 60(b) motions, however, may properly be used to allege "defect[s] in the integrity of the federal habeas proceedings." *Gonzalez*, 545 U.S. at 532. A Rule 60(b) motion is not successive when a movant "asserts that a previous ruling which precluded a merits

determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." *Id.* at 532 n.4.

Mr. Hutchinson contends that his Rule 60(b) motion is not a successive § 2254 petition because it does not raise a claim for constitutional relief, but instead alleges an accumulation of factors that have created a defect in the integrity of the federal habeas proceedings and have established extraordinary circumstances under Rule 60(b)(6). He argues that reopening the 2009 petition will provide an initial merits review, not a successive one, of his claims. ECF No. 78 at 64-65.

Grounds Presented for Relief

Mr. Hutchinson requests the Court to conduct a "holistic and cumulative review" in its Rule 60(b)(6) analysis, taking into consideration a "wide range of factors" and exercise its broad discretion to allow merits review of his constitutional claims for the first time.

A. Attorneys' Conduct

Mr. Hutchinson first contends that extraordinary circumstances exist under Rule 60(b)(6) to warrant reopening the 2009 § 2254 petition because of ineffective assistance of his prior federal counsel, Mr. Doss, during the first federal proceeding. Although Mr. Hutchinson's amended motion concedes there is no recognized right to effective assistance of federal habeas counsel, he urges

consideration of that conduct as part of a "totality of the circumstances" analysis to determine if equitable relief should be granted.[4]

The amended motion argues that Mr. Doss's failings are also intertwined with reasons for the missed AEDPA deadline for his initial § 2254 petition. While agreeing that the ruling of the Eleventh Circuit that Mr. Hutchinson was not entitled to equitable tolling of the deadline cannot be revisited, Mr. Hutchinson contends that state postconviction counsel's miscalculation of the deadline for filing the state postconviction motion necessary to toll the running of the AEDPA statute of limitations should also be considered in the totality-of-the-circumstances analysis. ECF No. 78 at 7-8. The amended motion recognizes that soon after the deadline passed, Mr. Hutchinson discovered that his attorneys had filed his state postconviction motion too late to toll the AEDPA statute of limitations, but Mr. Hutchinson waited almost four years, until the state litigation was over, before filing a pro se federal § 2254 petition. *Id.* at 8. It was upon this set of facts that the Eleventh Circuit found Mr. Hutchinson had not been diligent in pursuing his rights to warrant equitable tolling. *Hutchinson*, 677 F. 3d at 1102-03.

[4] The amended motion notes that Mr. Hutchinson's pro se Rule 60(b) motion alleged that his federal counsel committed fraud on the court under Rule 60(b)(3). The motion cited counsel's failure to include an actual innocence claim in his petition, a request to the Court for a stay and authorization to exhaust innocence issues in state court but never undertaking any state litigation, and failure to provide this Court and the Eleventh Circuit with critical records in support of equitable tolling arguments. ECF No. 78 at 6. His current amended motion recognizes, however, that the Rule 60(b)(3) fraud on the court ground requires fraud by an "opposing party" not counsel. ECF No. 78 at 7 n.1.

The amended Rule 60(b)(6) motion notes that Mr. Hutchinson argued in his pro se motion that his federal counsel failed to obtain the entire state postconviction record prior to amending his 2009 habeas petition and failed to include in it an actual innocence claim. Federal counsel sought a stay of proceedings with the stated intention to return to state court to pursue a claim of actual innocence. *See* Case No. 5:09cv261/RS, ECF Nos. 20, 24. Five months later the Court issued an order to show cause why the stay was still necessary. In response, Mr. Doss responded that he had not yet been able to pursue state court remedies because he did not represent Mr. Hutchinson in state court and had been unable to obtain funding for Mr. Hutchinson to pursue the state claims. *See id*. ECF No. 37. Mr. Doss also asked to be appointed to represent Mr. Hutchinson in state court, but that request was denied. *See id.* ECF No. 39 at 4.

Although noting that there is no recognized right to effective assistance of federal habeas counsel, the amended Rule 60(b)(6) motion contends that this conduct by federal appointed counsel should be considered as part of the extraordinary circumstances analysis because, in addition to Mr. Doss's fault in failing to present a complete actual innocence claim, "the Court's own rulings contributed unfairness to the process as well." Case No. 3:13cv128-MW, ECF No. 78 at 12-13.

Whether the first § 2254 petition was filed without a complete record or was incomplete without an actual innocence claim misses the mark—that deficiency did not contribute to the late filing of the petition and does not provide extraordinary circumstances to require reopening it. Neither did this Court's rulings contribute to the late filing of the petition in 2009. Nothing appointed counsel did after Mr. Hutchinson's first, pro se, petition was filed almost four years late on July 24, 2009, caused the late filing or provides extraordinary circumstances for reopening that petition.

Mr. Hutchinson also argues that his state postconviction counsel's filing of his state postconviction motion after the running of federal habeas limitations period should also be considered as part of the holistic review of alleged extraordinary circumstances. As he recognizes in his motion, this Court cannot revisit the Eleventh Circuit's holding that he was not entitled to equitable tolling for that reason. Nothing can be gained by repeating all the facts surrounding conduct of the state postconviction counsel and Mr. Hutchinson's own failure of diligence in pursuing his federal rights for nearly four years after learning that his state postconviction proceeding had been filed too late to toll the running of his federal limitations period. *See Hutchinson*, 677 F.3d at 1099-1100. Even when those circumstances are revisited in a review of all possible factors supporting a claim of extraordinary circumstances, no extraordinary circumstance is shown.

"Although the distinct categories of extraordinary circumstances that support reopening of a final judgment under Rule 60(b)(6) and those that support equitable tolling may overlap, an extraordinary circumstance must independently warrant each particular relief sought." *Zack*, 721 F. App'x at 923 (unpublished). In *Zack*, the Eleventh Circuit found that "system failures" in the state proceedings—the State's delay in appointing him counsel in sufficient time for him to meet his federal habeas deadlines—does not constitute a defect in the integrity of the federal habeas proceeding for purposes of Rule 60(b)(6) and cannot constitute extraordinary circumstances under the rule. *Id.* at 925. Similarly, state counsel's miscalculation of the filing date of Mr. Hutchinson's state postconviction motion was not an extraordinary circumstance warranting equitable tolling and it is not an extraordinary circumstance warranting relief under Rule 60(b) when considered independently or when considered cumulatively with the other facts cited by Mr. Hutchinson.

Mr. Hutchinson also argues that the facts establishing extraordinary circumstances include this Court's "unfairness" in its "failure to rule on Mr. Doss's motion for authorization to appear in state court to pursue Mr. Hutchinson's innocence remedies." However, neither Mr. Doss's failure to include an actual innocence claim in the amended petition he filed in 2009, nor his inability to return to State court to pursue innocence remedies, constituted a defect in the integrity of

the proceeding rising to the level of extraordinary circumstances necessary for reopening the 2009 petition under Rule 60(b)(6).

B. Changes in the Law

1. *McQuiggin* and the Actual Innocence Gateway

The amended motion also relies on the decision in *McQuiggin v. Perkins*, 569 U.S. 383 (2013), first, as one of the rare changes in decisional law that should serve as an extraordinary circumstance sufficient to reopen his first federal habeas petition. Second, he contends that the decision is a gateway to allow merits review of the first petition based on his actual innocence. ECF No. 78 at 22, 25. *McQuiggin* was decided several years after Mr. Hutchinson's first federal habeas petition was dismissed. The United States Supreme Court held in *McQuiggin* that a prisoner filing a first federal habeas petition could overcome the one-year statute of limitations set forth in 28 U.S.C. § 2244(d)(1) upon a showing of "actual innocence." *Id*. at 386. However, "a petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt." *Id.* (2013) (quoting *Schlup v. Delo*, 513 U.S. 298, 329 (1995)).

A habeas petitioner asserting a claim of actual innocence need not prove diligence to overcome a procedural bar, but timing is a relevant factor in evaluating the reliability of proof of innocence. Unexplained delay in presenting new

evidence to support a claim of actual innocence bears on the determination of whether the petitioner has made a sufficient showing. *McQuiggin*, 569 U.S. at 399. *See also House v. Bell*, 547 U.S. 518, 537 (2006).

In this case, Mr. Hutchinson is not raising *McQuiggin* at the time of filing a first untimely petition, but in the context of a motion to reopen a years-old dismissed petition. Nothing in *McQuiggin* indicates that it should be applied retroactively to habeas cases already dismissed as untimely or otherwise on collateral review. The Third Circuit, however, has held that *McQuiggin*'s change in law may constitute an exceptional circumstance under Rule 60(b)(6) for reopening a prior untimely petition if the petitioner can make a showing of actual innocence. *Satterfield v. District Attorney Philadelphia*, 872 F.3d 152, 163 (3d Cir. 2017). Assuming without deciding that Mr. Hutchinson may seek to reopen his untimely initial federal habeas petition in a Rule 60(b)(6) motion filed almost four years later based on the "actual innocence" gateway of *McQuiggin*, the allegations provided in Mr. Hutchinson's Rule 60(b)(6) do not identify any new, reliable evidence establishing his actual, factual innocence.

A claim of actual innocence requires a petitioner to "support his allegations of constitutional error with new reliable evidence—whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence—that was not presented at trial." *Schlup*, 513 U.S. at 324. Mr.

Hutchinson has provided no evidence at all that shows "it is more likely than not that no reasonable juror would have convicted" him. *McQuiggin*, 569 U.S. at 395 (quoting *Schlup*, 513 U.S. at 329). Thus, the decision in *McQuiggin* and Mr. Hutchinson's claims of actual innocence provide no basis for reopening the untimely 2009 petition.

Mr. Hutchinson's counseled Rule 60(b)(6) motion mentions without discussion allegations he made in his earlier pro se motion concerning evidence he contended should be considered in determining if the 2009 petition should be reopened.[5] The counseled motion further alleges in more detail the existence of new evidence—FBI records obtained through the Freedom of Information Act that discussed investigation of Mr. Hutchinson's former friends Billy Lee Taylor, Joel Adams, and Deanna Adams for a bank robbery. The Adams, then husband and wife, were friends and supportive of Mr. Hutchinson after his arrest, but ultimately testified at trial that the voice on the 911 call stating the caller just shot his family was Mr. Hutchinson's. *See Hutchinson v. State*, 882 So. 2d 943, 948 (Fla. 2004).

[5] The pro se motion alleged *inter alia* that the father of the murdered children had a motive to kill them and their mother; that the murder weapon did not have blood, fingerprints, or DNA on it; that a witness could have testified that a man wearing a hat or mask was seen driving Mr. Hutchinson's truck; that the medical examiner had a history of falsifying autopsy findings; and that a lady's tan nylon stocking that could have been used as a mask was found in the backyard of the home but not tested. Case No. 3:13cv128-MW, ECF No. 17 at 13-20. It should be noted that Mr. Hutchinson told officers that two men entered the home wearing black ski masks, not masks made of a lady's nylon stocking. *Hutchinson, v. State*, 17 So. 3d 696, 792 (Fla. 2013). The counseled amended motion states that the murder weapon was not tested for DNA. ECF No. 78 at 35.

Mr. Hutchinson argues now that the FBI files support the defense theory that the Adams "flipped to support the prosecution" because of pressure from law enforcement investigating their role in a bank robbery. ECF No. 78 at 28-29.

The amended motion states that at the time of trial, defense counsel knew of Mr. Taylor's arrest for bank robbery and knew of the grand jury testimony of Mr. and Mrs. Adams and tried to cross examine them about it but were precluded by the trial court. The amended motion states that no investigative FBI files were disclosed to the defense at that time giving details of the investigation or explaining why the Adams were not tried for the crime. He asserts this FBI report contains new exculpatory and impeaching evidence not previously provided and proves his innocence because the information about two men who perpetrated the bank robbery wearing masks and carrying shotguns is consistent with his innocence theory and because it shows the Adams had a motive to lie at his trial. ECF No. 78 at 30-31.

However, evidence that may be consistent with an innocence theory is not necessarily evidence of actual innocence. The evidence presented at trial showed that Mr. Hutchinson argued with Renee, packed some belongings and his guns, and went to a bar where he drank and complained about the argument. *See Hutchinson v. State*, 17 So. 3d 696, 698 (Fla. 2013). Forty minutes later, a 911 call was received from Renee's residence in which the caller stated he just shot his family.

Id. When officers arrived, Mr. Hutchinson was on the floor of the garage with the cordless phone nearby still connected to the 911 operator. *Id.* The murder weapon, a shotgun that belonged to Mr. Hutchinson, was found on the kitchen counter and he had gunshot residue on his hands. Body tissue from one of the child victims was on Mr. Hutchinson's leg. *Id.* Mr. Hutchinson's defense at trial was that two men wearing masks and carrying shotguns entered the home, struggled with him, shot the family, albeit with Mr. Hutchinson's shotgun, and left. *Id.* He also told the officers that he struggled with the men, but the evidence showed he had no wounds or evidence of a struggle on his body. *See Hutchinson*, 882 So. 2d at 948-49.

The FBI files that he contends show the Adams had a motive to lie and that two men robbed a bank wearing ski masks and carrying shotguns may be new evidence as he contends, but that evidence does not meet the requirement of reliable evidence of his actual, factual innocence. *See, e.g.*, *Rozzelle v. Sec'y, Fla. Dep't of Corr.*, 672 F.3d 1000, 1012-15 (11th Cir. 2012) (holding that actual innocence requires a showing of actual, factual innocence, rather than legal innocence). Even if the Adams had not identified Mr. Hutchinson's voice on the 911 call, and even if two men robbed a bank wearing masks and carrying shotguns, the jury had sufficient evidence before it to conclude that he made the call and that he shot his girlfriend and her children with his own shotgun.

The counseled Rule 60(b)(6) motion also contends that other factors add to the cumulative total of facts that show extraordinary circumstances justifying the reopening of the 2009 petition. He asks the Court to consider "how the federal habeas proceedings impeded Mr. Hutchinson from successfully securing independent DNA testing in the Florida courts to establish his actual innocence." ECF No. 78 at 32. He explains that during the first petition proceeding, Mr. Doss moved for authorization to litigate in state court a request for DNA testing of a metal door strip from the kitchen to the garage, which was not tested and presented to the jury even though his trial counsel had possession of that potential DNA evidence. He alleges DNA evidence taken from Mr. Hutchinson's body could establish that another person was involved in the crime. He cites trial counsel's alleged failure to ask for independent DNA testing after learning from the DNA analyst that all the DNA evidence had to be re-examined before trial due to the possibility that the standards had been switched. *Id.* at 33-34.

Mr. Hutchinson contends that this Court's failure to rule on the motion to exhaust the DNA claims in the first petition proceeding adds to the cumulative defects in integrity of the proceeding and warrants reopening the 2009 petition. He reports that when Mr. Hutchinson later sought to litigate the DNA issues in State court, the Florida Supreme Court dismissed his appeal from denial of a pro so motion for DNA testing pursuant to Florida Rule of Criminal Appeal 3.853 (DNA

testing) as unauthorized because he did not proceed through counsel. *See Hutchinson v. State*, No. SC11-2301, 2012 WL 521209 (Fla. Feb. 8, 2012). *See also* ECF No. 17 at 6.

Mr. Hutchinson argues that all the evidence he has cited—including evidence that was not DNA tested and has not provided any exculpatory results—and the evidence presented at trial establish his actual innocence such that under *McQuiggin*, his first petition should be reopened and heard on the merits. Although some of the evidence cited by Mr. Hutchinson, if proven, could tend to explain, diminish, or impeach certain other evidence in the case, nothing cited by Mr. Hutchinson demonstrates that he is actually innocent under the standards applicable to these claims. He has not demonstrated that in light of the alleged new evidence, considered with the evidence presented at trial, no juror acting reasonably would have voted to find him guilty. *See McQuiggin*, 569 U.S. at 386. This gateway standard is not equivalent to a sufficiency of evidence standard—instead, the Court must make a probabilistic determination of what reasonable, properly instructed jurors would do if they considered all the evidence presented. *See House*, 547 U.S. at 538.

Mr. Hutchinson presented his defense at trial that two intruders wearing masks and carrying shotguns invaded the home and shot his girlfriend and her children. He testified that he tried to defend them but was unsuccessful. He also

asserted a defense of intoxication. These defenses was rejected by the jury. The Florida Supreme Court rejected his claim of actual innocence, finding that the evidence reviewed on direct appeal was sufficient to sustain a conviction for premeditated first-degree murder. *Hutchinson*, 17 So. 3d at 703. Much of what he presents as new evidence existed at the time of trial and was available to his counsel at least as late as the filing of the first habeas petition in 2009. Even if all the evidence proffered in the amended Rule 60(b)(6) motion is considered as new, none is of the type of new, reliable evidence contemplated by *Schlup*—reliable exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence calling into question his guilt. And, none demonstrates that it is more likely than not that no reasonable juror would have convicted Mr. Hutchinson. *McQuiggin*'s gateway is not a change in the law that provides an extraordinary circumstance requiring the reopening of Mr. Hutchinson's 2009 federal habeas petition under Rule 60(b)(6).[6]

2. *Martinez v. Ryan*

As another factor urged by Mr. Hutchinson as one of multiple factors that he contends create extraordinary circumstances warranting reopening the 2009 federal

[6] The amended motion suggests that an evidentiary hearing should be held. For all the foregoing reasons, an evidentiary hearing is not required and will not be provided. The district court need not conduct an evidentiary hearing on a Rule 60(b) motion unless a hearing is necessary to aid the district court's analysis. *See, e.g., Cano v. Baker*, 435 F.3d 1337, 1342-43 (11th Cir. 2006).

habeas petition, Mr. Hutchinson cites the decision in *Martinez v. Ryan*, 566 U.S. 1 (2012). *Martinez* established a new equitable rule that would allow federal review claims of ineffective assistance of trial counsel if postconviction counsel, under certain circumstances, failed to raise the claim in state proceedings. The Eleventh Circuit held in *Arthur v. Thomas*, 739 F.3d 611, 630 (11th Cir. 2014), that the rule announced in *Martinez* is inapplicable to Rule 60(b)(6) motion and does not provide extraordinary circumstances under the rule where dismissal of the petition sought to be reopened is due to the operation of the AEDPA's federal limitations. Mr. Hutchinson's invitation to find that the Eleventh Circuit's holding in *Arthur* is incorrect is declined. The *Martinez* decision, even if considered as one of a number of factors urged by Mr. Hutchinson, does not demonstrate that exceptional circumstances exist under Rule 60(b)(6) to reopen his untimely initial petition filed in 2009.

3. *Hurst v. Florida*

Mr. Hutchinson also relies on the issuance of decision in *Hurst v. Florida*, 577 U.S. 92 (2016), as another factor in his claim of cumulative extraordinary circumstances justifying relief under Rule 60(b)(6). He insists he does not present a substantive constitutional claim based on *Hurst*, but still contends that the decision casts doubt on the validity of his death sentence. In *Hurst v. Florida*, the United States Supreme Court extended the procedural rule in *Ring v. Arizona*, 536 U.S.

584 (2002), to find Florida's death penalty sentencing scheme unconstitutional because it did not require a jury to find the existence of an aggravating circumstance to support imposition of the death penalty. The Supreme Court more recently held that *Ring* and *Hurst* do not apply retroactively on collateral review. *See McKinney v. Arizona*, 140 S. Ct. 702, 708 (2020).

Mr. Hutchinson waived a penalty phase jury and his claim in State court based on *Hurst v. Florida* was rejected for that reason. *See Hutchinson v. State*, 243 So. 3d 880, 883 (Fla. 2018) (holding *Hurst* relief is not available for defendants who have waived a penalty phase jury). Even so, Mr. Hutchinson argues that the Florida Supreme Court's reliance on his waiver leaves "lingering federal constitutional doubts" about his death sentence—thereby creating an extraordinary circumstance sufficient to require reopening his 2009 federal petition—because when he waived a penalty phase jury, he did not know he was waiving a constitutional right to a jury finding of an aggravator. In spite of Mr. Hutchinson's disclaimer, his twenty-one page argument suggesting that he should be entitled to *Hurst* relief sails perilously close to a new substantive constitutional claim, which is not the proper basis for a Rule 60(b)(6) motion seeking to set aside an earlier dismissal based on the AEDPA statute of limitations. *See, e.g.*, *Gonzalez*, 545 U.S. at 531-32. Notwithstanding his contention that the constitutional validity of his death sentence is in doubt, he has not demonstrated that the decision in *Hurst*

v. Florida gives rise to an extraordinary circumstance supporting relief under Rule 60(b)(6).[7] The decision in *Hurst v. Florida* does not demonstrate an extraordinary circumstance, either individually or as part of a holistic review of factors, necessary for the rare relief provided under Rule 60(b)(6).

Conclusion

Mr. Hutchinson urges this Court to find the existence of extraordinary circumstances under Rule 60(b)(6) and reopen his initial federal habeas petition dismissed in 2009. He offers a conglomeration of factors, none of which independently or in a holistic review qualify as extraordinary. Mr. Hutchinson's pro se Rule 60(b) motion was originally denied because no grounds were shown to allow relief under the rule. ECF No. 24. Recognizing that "death is different," the Court vacated that order, reinstated the motion, appointed counsel to evaluate whether any legal grounds could be presented that would allow relief under the

[7] While not relied on by the Florida Supreme Court in denying Mr. Hutchinson *Hurst* relief, it is notable that prior to his sentencing, the jury found him guilty of four counts of first-degree murder, one of which did not result in a death sentence. In 2020, the Florida Supreme Court receded from its ruling in *Hurst v. State*, 202 So. 3d 40 (Fla. 2016), which implemented changes in Florida capital sentencing pursuant to *Hurst v. Florida.* The Florida Supreme Court held in *State v. Poole*, 297 So. 3d 487, 508 (Fla. 2020), *cert. denied*, *Poole v. Fla.*, --- S. Ct. ----, 2021 WL 78099 (Jan. 11, 2020), that under the court's precedent interpreting *Ring v. Arizona*, and under a "correct understanding" of *Hurst v. Florida*, the jury's finding the defendant guilty of other prior violent felonies satisfied the requirement of a jury finding of a statutory aggravator. Thus, under Florida law, there existed a prior violent felony conviction found by a jury beyond a reasonable doubt that qualifies as a statutory aggravator and militates against the conclusion that Mr. Hutchinson's waiver of a penalty-phase jury creates lingering doubt about the constitutionality of his sentence in light of *Hurst*.

rule, and allowed the instant amended motion to be filed. While the current counseled motion expands on the grounds presented in the pro se motion, it essentially repackages many of the same grounds and still does not provide a basis on which to find extraordinary circumstances exist for reopening the 2009 habeas petition. For the reasons explained above, the motion filed under Federal Rule of Civil Procedure 60(b)(6) is denied.

Certificate of Appealability

An appeal of the denial of a Rule 60(b) motion requires a certificate of appealability (COA). *Williams v. Chatman*, 510 F.3d 1290, 1294 (11th Cir. 2007); *Gonzalez v. Sec'y for Dept. of Corrections*, 366 F.3d 1253, 1263 (11th Cir. 2004). A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). Further, a COA should not issue in the appeal from the denial of a Rule 60(b) motion unless the Petitioner shows, at a minimum, that it is debatable among jurists of reason whether the district court abused its discretion in denying the motion. *See, e.g., Lambrix v. Sec'y, Fla. Dep't of Corr.*, 851 F.3d 1158, 1169 (11th Cir. 2017). Relief under Rule 60(b)(6) is available only in extraordinary circumstances. *Lambrix*, 851 F.3d at 1170. Mr. Hutchinson has failed to show an abuse of discretion in denial of the Rule 60(b) motion and has failed to

make a substantial showing of the denial of a constitutional right. Issuance of a COA is therefore not warranted.

For the foregoing reasons,

IT IS ORDERED:

1. Mr. Hutchinson's counseled amended motion for relief from judgment under Federal Rule of Civil Procedure 60(b), ECF No. 78, is **DENIED**.

2. A certificate of appealability is **DENIED**.

3. The Clerk shall enter judgment stating, "Jeffrey Glenn Hutchinson's amended motion for relief from judgment under Federal Rule of Civil Procedure 60(b), ECF No. 78, is **DENIED**."

4. The Clerk shall close the file.

SO ORDERED on January 15, 2021.

s/Mark E. Walker
Chief United States District Judge